Supreme Court of the United States

OCTOBER TERM, 1952

ACCINANTO LTD., et al., Petitioners, vs. A/S J. LUDWIG MOWINCKELS REDERI and COSMOPOLITAN SHIPPING COMPANY, INC., Respondents.	No. 506

BRIEF SUBMITTED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS

Proceedings Below

Petitioners are cargo underwriters, consignees, etc., suing to recover for loss or damage to cargo shipped on board the S.S. Ocean Liberty, which was destroyed by fire and ensuing explosion at Brest, France, on July 28, 1947 (R. 21, 22).*

Respondent, A/S J. Ludwig Mowinckels Rederi, a Norwegian corporation, was the time charterer of the Ocean Liberty, of the well-known "Liberty" type built in the U. S. A. in 1943 (A. 598).

Cosmopolitan Shipping Company, Inc., the other respondent, with offices in New York, was the New York agent

* Numbers preceded by "R." refer to the pages of Vol. 4 of the printed record, the proceedings in the Court of Appeals. Numbers preceded by "A." refer to pages of Vols. I and II, the "Ship Appendix." "Nitrate" or "ammonium nitrate" when used herein mean "ammonium nitrate, fertilizer grade", sometimes called "Fgan".

of Mowinckels Rederi. It had no office in Baltimore and none of its employees was present when the Ocean Liberty was loaded there.

The libel alleges two causes of action; *first*, for non-delivery of merchandise, against Mowinckels Rederi and Cosmopolitan Shipping as joint carriers (A. 2); *second*, for deviation in that the Ocean Liberty called at Brest because of a strike at Antwerp (A. 4).

Prior to the trial, proctors for libellants discontinued a suit to recover $345,000 for the loss of the nitrate (A. 44) evidently because of the realization of their clients that the claim of bad stowage was without merit.

The assertion that Cosmopolitan Shipping Company, Inc., was a carrier of the merchandise broke down and was abandoned. Libellants shifted their ground at the trial, and sought to sustain a cause of action against Cosmopolitan Shipping Company on the ground of the latter's negligence, *despite the absence of any assertion of negligence in the libels.*

The District Court resolved the controversy as follows:

(1) The libels against Cosmopolitan Shipping Company, Inc., were dismissed (A. 76).

(2) The causes of action based on the theory of deviation were also dismissed (A. 76).

(3) An interlocutory decree in favor of libellants and against Mowinckels Rederi was entered (A. 76) on a theory of "constructive" fault on the part of Mowinckels in the face of the admission of libellants' counsel that "one cannot overlook the fact that Mowinckels is in Norway and presumably knew nothing of the way this ship was stowed" (A. 399).

Both parties appealed to the Court of Appeals which reversed the interlocutory decree in favor of libellants, directed a dismissal of the libels and affirmed the decision below in all other respects (R. 36).

Petitioners then moved for a rehearing and for an amendment of the Court of Appeals opinion (without specifying the amendment desired). This motion was denied (R. 70, 71).

The case at bar is of interest only to the parties; there are no "special and important" reasons why a writ of certiorari should be granted (Rule 38(5)).

The Court of Appeals decided this cause adversely to petitioners on the ground that they had not shown negligence in stowage, saying:

> "We do not think, however, that there is adequate support for the finding that there was negligence in the stowage of the Fgan or for holding Mowinckels liable because of such stowage. In the first place, we do not think that in the light of knowledge existing at the time it can be said that there was negligence or lack of ordinary care in the stowage. * * * Even they [Petitioners' experts] do not say that at the time of the loading of the Ocean Liberty there was any scientific teaching to the effect that Fgan was likely to heat because of its wax coating or that it was dangerous to stow it in paper bags, or that it was customary to give it any greater ventilation than other bagged cargo" (R. 22, 23).
>
> " * * * Surely they [the stevedores and carrier] are not to be held negligent when they seek and follow the advice of expert and experienced agencies such as the Coast Guard, the Fire Department and the Board of Underwriters, instead of mapping out rules of their own based upon consultation with academic experts" (R. 28).

Again at R. 29:

> "It would not be reasonable to hold the carrier or the stevedore chargeable with knowledge that this expert committee [the Interagency Committee, appointed by the Secretary of the Treasury 'to study every possible hazardous aspect of ammonium nitrate' (R. 28)] did not have or with reaching conclusions that it did not reach after careful study, or with negligence in not adopting safety measures that the committee did not so much as suggest."

This case cannot be a controlling precedent as respects any other. All that was decided was the issue of due care in the light of particular facts. There is no conflict with any decision in another circuit nor with applicable local law.

Facts

The facts are summarized by the Court of Appeals (R. 18-29), and are restated here because of the distorted impression created by the many incorrect and misleading statements in the petition. The more serious errors and omissions are specifically commented on, infra Point III, pp. 16-27.

Relevant Dates

The Ocean Liberty arrived at Baltimore on Saturday, June 28, 1947 (A. 28).

The holds in which she was to load the nitrate were examined by a lieutenant of the United States Coast Guard, Battalion Chief Trenner of the Baltimore Fire Department and Captain Carter, surveyor to the New York Board of Underwriters (A. 212). After washing, cleaning and approval of these holds, loading commenced on June 30, the nitrate being stowed in lower holds 1, 3 and 5 (A. 212, 329).

The Ocean Liberty, having loaded her Baltimore cargo, left for New York on July 5 (A. 29).

At New York further cargo was loaded, and she sailed from New York on July 11 (A. 30).

On July 23, she arrived at Brest and began to discharge on the next day (A. 534).

Discharging continued normally until 12:30 P. M. Monday, July 28, 1947, at which time slight smoke was noticed emerging from a starboard ventilator which served holds 2 and 3 and was situated between them (A. 523, 524, 525).

The Brest Fire Department was promptly notified, and measures were taken to extinguish the fire which, however, increased in intensity (A. 537-539). As the fire could not

be controlled, the Ocean Liberty was towed by French government tugs into the outer harbor, where she grounded (A. 541-542).

A French naval vessel thereupon cannonaded the hull of the ship apparently in order to blow a hole in her side so that her holds might be flooded (A. 544). At about 5.35 P. M., after having been on fire for five hours, the ship exploded (A. 546).

Loading Precautions

Because of the fire and explosion on the Grand Camp at Texas City on April 16, 1947, the loading and stowage of the Ocean Liberty at Baltimore were kept under the constant supervision and control of the Coast Guard, Fire Department and Board of Underwriters (A. 29).

In particular, the following precautions were strictly observed:

(1) Before loading, the compartments in which the nitrate was loaded were thoroughly cleaned (A. 212, 328, 329).

(2) No other cargo was loaded in the same compartments with the nitrate (A. 213, 29, 30).

(3) No bags were loaded at a temperature exceeding 100° F. (A. 29; R. 24).

(4) The bags were loaded directly into the ship from the railroad cars so as to avoid any risk of contamination (A. 270).

(5) The utmost care was taken to avoid loading any broken bags (A. 185, 186) and to sweep up any nitrate that might escape from the bags (A. 184).

(6) No smoking was allowed (A. 331).

(7) A fire hose was kept on deck running at all times and a special fire watch employed (A. 170).

Ventilation and "Bag on Bag" Stowage

The nitrate bags were stowed by the "bag on bag" method (A. 191). Schmidt, a practical stevedore of long experience, called by libellant-petitioners, testified that this was the best method of stowing paper bags and allowed ventilation in the spaces between the ends of the bags (A. 155). Mieskowski, a stevedore of equal qualifications, also called by libellants, agreed with Schmidt's testimony (A. 183). When the Liberty ship, Henry T. Scott, was loaded with nitrate near New Orleans in May, 1947, the nitrate was stowed in the same way, and Mr. G. S. Scott, a chemist, who took temperatures in the stow on behalf of the United States Bureau of Mines, testified that, as the bags were rounded at the ends, there was a channel in between each one (A. 409) and also that, as the temperatures taken by him in the stow reflected the fluctuations in the open air temperature, ventilation was taking place (A. 409).

Air Spaces at Top, Bottom and on All Four Sides of the Stow

There was a space of about 2½ to 3 feet between the top of the bags and the deck beams (A. 339). Any warm air would rise into this space and be blown out through one or more of the four ample-sized ventilators (A. 335, 466) which served this hold (A. 599).

On each side of the hold there were fitted batten boards as customary, so that the bags did not rest against the side or "skin" of the ship. There was a space of about 1′ 2″ between the batten boards and the "skin" in which space air could freely circulate (A. 587).

At the fore and aft bulkheads of the hold were so-called "stiffeners", i.e., vertical steel beams which strengthened the bulkheads. The distances between the bulkhead and the outer edge of these "stiffeners" was 1′ 3″ (A. 586); this

space of 1′ 3″ (at each end) allowed ventilation fore and aft of the bags.

Under the bags was a double layer of dunnage (planks about 2 inches thick). These planks were laid with interstices between them, allowing ventilation underneath the bags (A. 339).

The lower hold in which the nitrate was stowed was, of course, below the water-line. It was thus cooled by the sea water outside the hull and was protected from the heat of the sun by the 'tween deck space and the cargo stowed therein (A. 465).

Temperatures taken in ammonium nitrate stowed on the Liberty type ship, Henry T. Scott (substantially a sister ship), showed that lower hold No. 3 was cooler than the outside air (A. 629).

FIRST POINT

The Ocean Liberty was loaded and stowed without negligence on the part of anyone.

The expert witnesses as to the propriety of the stowage can be divided into two classes:

(1) Witnesses well acquainted with problems of stowage, including ventilation of cargo;

(2) Chemists unacquainted with stowage.

(1) The testimony of all the qualified witnesses in the first class fully approved the stowage of the Ocean Liberty; no one condemned it. Libellants called no qualified witnesses to testify that the stowage should have been different.

Some of those who approved the stowage are:

Carter, chief Baltimore surveyor to the Board of Underwriters of New York (A. 208). Captain Carter had studied literature on the subject, had consulted Mr. McKenna, chief

chemist for the Association of American Railroads (A. 233) and Captain Parker, Chief Surveyor of the Board of Underwriters at New York (A. 266); and had attended a meeting called to discuss the loading and stowage of Fgan by the Baltimore & Ohio R. R. on May 22, at which were present railroad representatives, steamship representatives and chemists from the Association of American Railroads (A. 247, 270).

Blanchard, Superintendent of the United States Lines Company, graduate of the University of Glasgow with a Bachelor of Science degree, who had consulted a leading firm of Baltimore chemists on the carriage of Fgan (A. 274, 275).

Carroll (A. 317), steamship agent and stevedore.

Weglein, Baltimore surveyor to the Board of Underwriters under Captain Carter (A. 327, 331, 335); he testified specifically that the stowage fully complied with the rules of the Board of Underwriters (A. 331).

Neilson (A. 432), stevedore superintendent, who loaded a number of vessels with Fgan at United States Gulf ports both before and after the Ocean Liberty.

Schmidt and Mieskowski of Terminal Shipping Co., referred to *supra*, page 6.

Trenner, Battalion Chief of the Fire Department in charge of Fire Prevention (A. 101). Chief Trenner testified that the Fire Department had issued regulations as to storage and stowage of Fgan (A. 108) which were the same as those recommended by the National Board of Fire Underwriters (Liblt.'s Ex. 1; A. 612); that "at no time" did he find any treatment of the Fgan in the stowage that was against any regulations or against any instructions or against what he thought was proper practice (A. 128).

The stowage complied with all rules and regulations of the U. S. Coast Guard, Board of Underwriters of New York, National Board of Fire Underwriters and Baltimore Fire Department (R. 27).

(2) Testimony of chemists unacquainted with stowage.

Mr. Scott, who was with the Bureau of Mines, specializing in gaseous explosions research (A. 400) was the best qualified expert. He had had experience of 400 cases of spontaneous ignition in coal (A. 413). After the explosion of the Grandcamp, some undamaged bags of nitrate were collected and sent to the Bureau of Mines (A. 693), and Scott took part in experiments made with respect to them (A. 413).

Mr. Scott and Mr. Burns were in charge of the large-scale experiment made on the S.S. Henry T. Scott which loaded a full cargo of Fgan at New Orleans in May, 1947 (A. 400). Their instructions were to install thermocouples throughout the cargo and determine if there was any "spontaneous heating". Their report states that no spontaneous heating could be observed (A. 629, 665).

Still later Scott prepared a resume of all available publications on Fgan; his compendium was issued by the Bureau of Mines and is at A. 645-683; he consulted and abstracted no less than 115 publications on the subject (A. 683).

He testified that the investigations made disproved the possibility of self-heating of Fgan when stowed under ordinary conditions, as in the case at bar (A. 417, 418).

Dr. Kistiakowsky, libellants' leading expert, when under retainer by the Monsanto Chemical Co., visited their plant at Texas City soon after the explosion and was "briefed" with the "facts", among which was the *absolutely false* assertion that some of the nitrate was "so hot that longshoremen had to use *asbestos gloves* to put it on the ship" (italics ours; A. 381).

The testimony as to the heat of the bags is directly to the contrary and is that the Texas City longshoremen wore no gloves at all (A. 479); no bags were more than slightly warm (A. 499).

Dr. Kistiakowsky was misguided by this definitely false premise that the bags were so hot that they had to be handled with "asbestos gloves".

Two years later, Dr. Kistiakowsky experimented with an unexploded portion of the Fgan which had been in a warehouse at Texas City in April, 1947 (A. 351). In the two-year interval, due to changes in humidity, etc., the paper bagging doubtless became impregnated with nitrate.

In laboratory experiments, with an area of contact between the Fgan and the paper, *twenty-five times* as great as was the case when the Fgan was packaged in the usual way (A. 371), Dr. Kistiakowsky found that *there was no self-heating so long as the temperature was not raised above 190° F.* But when he raised the temperature to 200° F. a fire due to self-heating resulted (A. 354).

The District Court found, and this finding was confirmed on appeal, that the temperature of the nitrate loaded on the Ocean Liberty was not more than 100° F. (A. 29; R. 24).

The temperature of the Fgan on the Ocean Liberty was therefore, even on the basis of these laboratory experiments, 100° too low for self-heating to be initiated.

The Interagency Report, which was issued on August 20, 1947 (R. 28), stated that:

> "Limited tests and experience indicate that ammonium nitrate fertilizer of the type involved in the Texas City disaster stowed as cargo in holds of ships, does not heat spontaneously when the temperature of the fertilizer at the time of loading does not exceed 140 degrees Fahrenheit" (A. 696).

Dr. Kistiakowsky said he would accept this (A. 393-4). He also testified that he considered the Henry T. Scott well ventilated (A. 392). The Ocean Liberty was stowed in the same way.

Dr. Kistiakowsky was not asked any hypothetical question based on the actual facts relating to the loading and stowage of the Ocean Liberty. It is obvious that, if such a question had been put to him, he would have answered that self-heating could not be the explanation and that no negligence on anyone's part was involved.

The above facts clearly show an absence of negligence on the part of anyone connected with the loading or stowage of the Ocean Liberty.

It is obvious, of course, that the issue of negligence *vel non* must be judged according to the existing state of knowledge at the time.

The Titania, 19 Fed. 101, 107;
The Cabo Hatteras, 5 F. Supp. 725, 734;
Boston Ins. Co. v. *Metro. Redwood Co.,* 197 Fed. 703, C. C. A. 9;
F. O. Bradley & Sons, Ltd. v. *Fed. Stm. Nav. Co.* [House of Lords], 137 Law Times Rep. 266;
The Australian Star, 67 Lloyd's List L. R. 110.

According to the existing state of knowledge in July, 1947, ammonium nitrate, fertilizer grade, was not known to be self-heating when stowed under the conditions prevailing on the Ocean Liberty; it is not known to be self-heating today (R. 24).

It has been claimed that an inquiry made of a competent chemist would have disclosed that Fgan was self-heating, with the result that "rice ventilators" would have been used.

Mr. Wise, Sr., President of Terminal Shipping Co., attended a meeting at Baltimore addressed by a chemist, but nothing was said thereat about risk of spontaneous combustion (R. 27).

Chemists were consulted by Captain Carter, Baltimore Surveyor of the Board of Underwriters (A. 233), and by Captain Blanchard of the United States Lines (A. 280, 281). Neither was informed that Fgan was self-heating.

Mr. Wise, Sr., died before the trial (A. 84), and it does not appear if he pursued his inquiry further. If he had obtained Circular No. 719 of the United States Department of Agriculture (A. 722), he would have read therein that self-heating in Fgan was not to be feared (A. 741, 742). In a publication of the Bureau of Mines, published May 21, 1947, it was stated that Fgan packed in the ordinary type

of paper bag at 199° F. did not heat further (A. 666, referring to Note 56 at A. 677). When the temperature was raised to 302° F. there was spontaneous ignition in 5 or 6 hours (A. 666).

The stowage of the Ocean Liberty was under the supervision and control of the Coast Guard, Fire Department and Board of Underwriters. They all approved it; no more skilled experts could have been picked.

By 46 U. S. C. § 170(7)(a), the Coast Guard is required to

> "Establish regulations with respect to the * * * stowage * * * of * * * dangerous articles or substances."

By Sub-paragraph (b):

> "The * * * stowage * * * of such dangerous articles or substances shall be in accordance with the regulations so established, which shall * * * be binding" (upon all parties concerned).

Having stowed the Ocean Liberty in accordance with the regulations and with the approval of public officers (Coast Guard) charged with a duty in the premises, fault cannot be imputed to the respondents.

> *Panama Mail S.S. Co.* v. *Davis,* 79 F. (2d) 430, C. C. A. 3;
> *The Annie Faxon,* 75 Fed. 312, 315, C. C. A. 9;
> *The South Coast,* 71 F. (2d) 891, 894, C. C. A. 9;
> *Ryan* v. *Feeney & Sheehan Bldg. Co.,* 239 N. Y. 43, 47.

There was no negligence with respect to the stowage because there was used

> "the degree of care which persons of ordinary intelligence and prudence, engaged in the same kind of business, commonly exercise under like circumstances."
>
> (*Canad. Nor. Ry.* v. *Senske,* 201 Fed. 637, 644, C. C. A. 8.)

Waddell v. *A. Guthrie Co.*, 45 F. (2d) 977, 979, C. C. A. 10;
Shankweiler v. *B. & O. Ry.*, 148 Fed. 195, 197-8, C. C. A. 6.

The Ocean Liberty was stowed like all of the other ships carrying ammonium nitrate (R. 20).

SECOND POINT

It is "established law" that cargo interests are subject to "the onerous burden of proving the cause of a fire and that the negligence of a managing representative of the carrier is related to the fire" (admitted in Petition, p. 14). This "onerous burden" was not sustained.

Petitioners' admission is supported by the following authorities, among others:

American Tobacco Co. v. *Katingo Hadjipatera,* 194 F. (2d) 449, C. A. 2;
The Strathdon, 89 Fed. 374, aff'd 101 Fed. 600, C. C. A. 2;
Hoskyn & Co. v. *Silver Line, Ltd.*, 143 F. (2d) 462, C. C. A. 2.

The origin and cause of the fire in the case at bar is necessarily a guess.

All that is known is that smoke was seen coming out of a ventilator between holds 2 and 3; this ventilator was connected with four different compartments—lower holds 2 and 3 and the like-numbered 'tween deck spaces. Fire initiated in any of these spaces might have been later communicated to lower hold 3.

Even if the fire began in lower hold 3, it does not follow that it resulted from spontaneous combustion of the nitrate.

The fire might have been accidentally introduced from outside through the ventilators or the mast house. Fires set by malicious persons are not uncommon. There are other possibilities.

The theory which petitioners seek to sustain is that 1381 tons of Fgan (R. 20) in No. 3 lower hold increased gradually in heat from 100° F. (R. 24) on July 5 to the ignition point of over 302° F. (A. 666) on July 28.

If ignition had occurred in this way, the nitrate in No. 3 hold must have been at a temperature of about 250° F. for several days and at approximately 300° F. on the day of the fire. Noisome fumes would have been emitted (A. 271) and the extreme heat could not have escaped notice of those on board.

Nevertheless, the evidence is undisputed that everything was normal until 12.30 P. M. on July 28, just after Bois made his round of the ship (A. 524, 582).

On July 28, stevedores were working in holds 2 and 4 from 6 A. M. until the fire broke out at 12.30 P. M. (A. 522, 523). It is inconceivable that men working in No. 2 separated from No. 3 only by a thin partition, would not have noticed a temperature of 300° F. in 1381 tons of nitrate in the adjoining hold and that heat and fumes would not have affected the men just outside No. 3 working on the deck (A. 523).

The fact that no heat or fumes were noticed prior to the actual outbreak of fire conclusively shows that the fire could not have resulted from mass heating of the nitrate as contended by petitioners.

A far more likely cause is the accidental introduction of fire through a ventilator on the morning of July 28 when two very heavy half hulls of barges were being discharged from the deck by the use of an "enormous crane" belonging to the French navy (A. 523).

Even if there was spontaneous ignition, it may have been occasioned by some error in the manufacture of the six-ply bags (not the nitrate) or even in some of the nitrate or by contamination before the bags reached Baltimore.

As properly conceded by petitioners' counsel in their brief filed in the Court of Appeals, page 11:

> "Of course a carrier is not obligated to take steps to obviate dangers presented by a latent characteristic of cargo, the existence of which no reasonable inquiry would expose."

That the stowage was not negligent is proved overwhelmingly (*supra,* pp. 7-8), but even if there had been negligent stowage, petitioners' case would fail unless they further established that the bad stowage caused the fire (*Hoskyn & Co. Ltd.* v. *Silver Line, supra,* p. 13; *The Chester Valley,* 110 F. (2d) 592, C. C. A. 5).

Proof that the loss may have occurred from any one of several causes, for many of which no liability would exist, is not sufficient.

> *New York Central R. Co.* v. *Ambrose,* 280 U. S. 486, 490.

Whenever an issue of negligence is raised, the proof must necessarily show not only negligence, but also that more care would have avoided the loss (*Peltola* v. *Whiting,* 132 F. (2d) 857, C. C. A. 2; *Overton* v. *Wenatchee Orchard Co.,* 183 Pac. (2) 473). That also, is not shown in the case at bar.

The District Judge's finding that the preponderance of the evidence was that the fire was caused by spontaneous ignition of the Fgan was due to his palpable error in believing that 25° Centigrade was equal to 102° F. (A. 45). Twenty-five degrees Centigrade is easily changed to Fahrenheit by multiplying by 1.8 and adding 32° so that the correct Fahrenheit temperature is 77°, a moderate temperature. It is not true therefore that the Ocean Liberty lay at Brest "for four successive days in unusually hot weather" and that this was "the final straw" (A. 44) that caused the ignition.

THIRD POINT

Erroneous and misleading statements in the petition.

1. The petition states, page 7, that the only interest of Cosmopolitan Shipping Co. was to ascertain if the shipment of Fgan was prohibited or if burdensome restrictions were imposed.

The above statement is untrue. After the Fgan had been booked by the French government Cosmopolitan Shipping consulted the U. S. Lines which had carried enormous quantities of Fgan without accident, the Board of Underwriters of New York and the Coast Guard (A. 444-5).

The Board of Underwriters, an inspection agency maintained by the principal marine underwriters (A. 209, 211), specializes in safe methods of stowage and issues written instructions thereon (A. 263, 614).

The Coast Guard is charged by statute with the duty of establishing regulations with respect to the stowage of dangerous substances, supra, page 12. Their regulations of over 150 pages include all kinds of dangerous cargo.

Both the Board of Underwriters and the Coast Guard are unquestionably familiar with the chemical constituents and characteristics of the shipments with which they deal.

The Baltimore Fire Department is of course familiar with fire prevention and had especially studied Fgan (A. 109, 113, 272).

The position of the Cosmopolitan Shipping Co. is misconceived by petitioners. Cosmopolitan Shipping Co. did not undertake to load and stow the Ocean Liberty.

It was the duty of Cosmopolitan Shipping Co. to solicit and book outward cargoes and to arrange for the delivery of in-bound, being compensated by a percentage of the freight. A ship's agent does not load and stow the ship; loading and stowage is performed by the stevedore; the functions of agent and stevedore are entirely distinct. *The*

Picqua, 97 Fed. 649, 651. In all such matters the final decision lies with the master, *Olsen* v. *U. S. Shipping Co.,* 213 Fed. 18, C. C. A. 2; *The Colima,* 82 Fed. 665.

2. The petition states, page 8, that prior to the stowage of the Ocean Liberty there was "extant a mass of recognized authorities warning of the danger of spontaneous ignition" of Fgan when stowed as on the Ocean Liberty. The petition cites District Court findings 20 (A. 34), 23 (A. 28) and 26 (A. 41) which fail to support the assertion.

District Court Finding No. 20 quotes the compilation of authorities prepared for the Bureau of Mines by Mr. Scott in which it is stated that "there is no recorded instance of spontaneous heating in pure ammonium nitrate. * * * The paraffin-type coated materials used in the manufacture of ammonium nitrate fertilizer apparently make little or no contribution to spontaneous heating. * * * According to plant experience, fertilizer packed in the multiwalled paper bags at 93 degrees C. (199 degrees F.) does not heat further."

Department of Agriculture Circular 719, cited in Finding 20 (A. 36), stated that no evidence of spontaneous heating in Fgan could be found (R. 23). To the same effect is the Scott report, supra, page 9.

Finding 23 quotes the recommendations in the report of the National Board of Fire Underwriters, but overlooks the fact that paragraph 3, which is quoted, *relates solely to storage in a warehouse,* this paragraph being under the heading "Storage" and paragraphs 5-11 being headed "Handling" (A. 612).

As stated *supra,* these recommendations were adopted as Rules of the Baltimore Fire Department and were meticulously complied with when the Ocean Liberty was loaded, supra, page 8.

District Court Finding 26 (A. 40-42), without citation of supporting evidence, states that the carrier is liable

because it *"relied too largely on only inspection of the loading by public officials."*

This disregards the rule that when duly promulgated governmental regulations are complied with under the supervision of the officials charged with their enforcement, the party so complying cannot be charged with negligence because of his compliance, *supra*, page 12, R. 28.

3. The petition states, page 8, that the 6-ply paper bags in which the nitrate was packaged would necessarily become torn, with resulting increase of danger of fire. This risk was practically non-existent, since the Interagency Report states that, in the six years preceding 1947, 1,440,000 tons of Fgan had been produced and transported, more than half of which were shipped by vessels in export (A. 694). Each vessel carrying Fgan was, in substance, a giant test tube.

4. The petition states, page 8, that the fire in Fgan on the Grandcamp at Texas was "spontaneous," in support of which Dr. Kistiakowsky is cited, and the findings of the District Court (later reversed by the Court of Appeals) in the Texas City litigation.

It has already been pointed out that Dr. Kistiakowsky had been incorrectly informed that the Fgan when loaded was so hot that it could be handled only with "asbestos gloves" (*supra*, p. 9), and this induced an erroneous conclusion.

Fire broke out on the Grandcamp before the loading had been completed, and when the bags had been in stow in the hold for only 3 or 4 days. The Coast Guard found the probable cause of the fire to be careless smoking, and that finding was concurred in by the Interagency Committee (R. 24).

In the Texas City case, a District Court finding is:

> "The evidence does not enable me to state the exact process which produced the fire in the Fertilizer, but it was *in the nature of* spontaneous combustion or spontaneous ignition." (Italics ours.)

The statement, that the process which produced the fire was "in the nature of" spontaneous combustion or ignition, covers a broad range of possible causes. There is no definite finding that the fire was due to spontaneous combustion of the Fgan.

Furthermore, the decision of the District Court was unanimously reversed by the Court of Appeals (197 F. (2d) 771). Hutcheson, C.J., with whom Borah, C.J. concurred, said, page 785:

> "Because, however, of the way the case was tried, because, too, of the too sweeping nature of the findings and conclusions, I agree with the appellant that the findings are contrary to the truth and right of the case and clearly erroneous, and that the judgments should, therefore, be reversed and the cause remanded for trial anew."

It is obvious, therefore, that this erroneous finding of the District Court cannot be relied upon as establishing that the fire on the Grandcamp was due to spontaneous ignition.

5. The petition, at pages 8 and 9, refers to the report of the National Board of Fire Underwriters. This report was sent to the Baltimore Fire Department and all of its recommendations were meticulously followed in the stowage of the Ocean Liberty (*supra,* p. 8). In view of the above, it is obviously unimportant that no copy was received by Cosmopolitan Shipping Co., Inc., particularly because there was nothing in that report "specifically stating that the fertilizer was subject to spontaneous combustion" (Fdg. 26, A. 42).

6. The petition on page 9 contains a number of incorrect statements, such as that no representative of the Cosmopolitan Shipping Co., Inc., consulted with any qualified person concerning the loading and stowage of the Fgan. These erroneous statements have, we believe, been sufficiently dealt with (*supra*, p. 16).

7. The petition, at page 9, states that lower hold No. 3 was the hottest compartment of the vessel which is not correct (A. 465). The record contains a list of carefully taken temperatures in lower hold No. 3 of the Henry T. Scott (A. 633-637), which loaded Fgan near New Orleans in the latter part of May, 1947, about a month prior to the Ocean Liberty. The Henry T. Scott was a Liberty ship resembling in all essential characteristics the Ocean Liberty (A. 624, 598). The readings of thermocouples inserted in the stow indicated that the temperature in the hold was not increasing. The average temperature in the stow, when the last reading was taken, was 82° F (A. 635). Petitioners' leading expert testified that Fgan would not begin to heat spontaneously until it had reached a temperature of over 190° F. (*supra*, p. 10).

It is said that the bags were packed together tightly. "Tight" stowage meant merely that "the ship could take the cargo to sea and the vessel would be seaworthy" (A. 332). Tight stowage did not prevent ventilation (A. 140, 409). "Loose" stowage would have caused unseaworthiness.

Nor is it correct to state that the bags were completely "encased" in paper (A. 145). The method of the stowage is described *supra*, pages 6, 7.

8. The petition states at page 10 that, when the Ocean Liberty reached New York, the officers of the Cosmopolitan Shipping Co. became familiar with how the Fgan had been stowed at Baltimore and made the situation worse by utilizing the 'tween deck space, by stowing cargo therein and by battening down the hatch on the weather deck.

It is not true that Cosmopolitan's own officers became familiar with how the Fgan had been stowed at Baltimore. Cosmopolitan Shipping Co., Inc., learned from the stowage plan that ammonium nitrate and no other cargo had been stowed in lower holds 1, 3 and 5. They were not advised, however, as to the method of stowage or whether any extraordinary means of ventilation had been used. Kerwin, "Operating Manager" of Cosmopolitan Shipping Co., Inc. (Cargo App. 72), but not an officer, and Bentson, Assistant Operations Manager (Cargo app. 105) knew there was nitrate in hold No. 3, but did not know of the method of the stowage because the hatch was not open (Cargo App. 91, 93, 115).

Cosmopolitan Shipping Co., Inc., did know that the Fgan had been stowed at Baltimore by a most reliable stevedoring firm under the direct supervision of the Coast Guard, Board of Underwriters and Fire Department, all of whose instructions had been complied with, and further knew that the stowage met with the approval of the master and officers of the vessel (A. 446-7).

The claim that no cargo should have been stowed in the 'tween deck space, so as to allow ventilation through the hatches, is fantastic.

The lower hold of a ship is not ventilated through the hatches. The Ocean Liberty was equipped with four very large ventilators, one at each corner of the hold, and these ventilators would afford all of the ventilation that could by any possibility be needed. It has been held that even two ventilators to a hold are sufficient. *Spang Chalfant* v. *Dimon S.S. Co.*, 57 F. (2d) 965, 967, C. C. A. 2. No witness, expert or otherwise, even so much as suggested that cargo should not have been loaded in the 'tween deck space.

The recommendations of the Board of Underwriters required that all ventilators and pipe exits be covered with fine wire mesh (A. 614), and this could not have been done if the weather deck and 'tween deck hatches had been left open, in addition to which the ship would have been unseaworthy because of the serious risk of taking a sea on board in a storm.

9. The petition states, page 10, that the master should have been warned of the danger of the Fgan and also that the Fgan could not be examined to ascertain if it was heating.

As to the first point there is no duty to instruct a master as to the care of cargo or ship unless the owner is in possession of information which the captain does not have. *Tempus Spg. Co.* v. *Dreyfus* (1931), 1 K. B. 195, 204, aff'd (1931) A. C. 726. The master had been at Baltimore throughout the loading period, and had received instructions from the Fire Department; the care exercised by the master at Baltimore, New York and Brest show that the master well understood what was required (A. 536, 574).

The Fgan in the lower hold could have been easily examined by entering the hold through the masthouse (A. 590). Mr. Scott entered No. 3 hold of the Henry T. Scott after the ship sailed (A. 629).

10. The petition quotes, at page 11, an extract from the opinion of the Court of Appeals (R. 35), to the effect that, if there was any negligence in the stowage, it was that of Terminal Shipping Company and would not constitute the "actual fault or privity" of the carrier, i.e., the respondent A/S J. Ludwig Mowinckels Rederi.

The Court of Appeals, in a previous part of its opinion, had held that there was no negligence in the stowage of the Fgan on the part of Terminal Shipping Company or anyone else (*supra*, p. 3).

That part of the opinion criticized by petitioners was not a necessary part of the decision and is to be considered as dictum.

In any event, the above conclusion of the Court of Appeals is entirely sound and not "shocking" as characterized by petitioners.

Petitioners have conceded (*supra*, p. 2, A. 399) that there is no *personal* fault on the part of respondent Mowinckels, but seek to attribute to Mowinckels alleged negligence on the part of either Cosmopolitan Shipping Co. or Terminal Shipping Company.

In *Boston Marine Ins. Co.* v. *Metropolitan Redwood Lumber Co.*, 197 Fed. 703, 709, C. C. A. 9, the Court of Appeals held that a shipowner, in order to avail himself of the limitation of liability statutes, was not required to

> "acquaint himself with the science of navigation or acquire expert knowledge concerning his vessel, its equipment, its machinery, or the necessary crew therefor, or * * * place between himself and the master an intermediary who shall possess such knowledge, * * * " (p. 709).

The respondents knew that the Ocean Liberty was to load ammonium nitrate but they were not required to become Super-Scientists and know more about ammonium nitrate than did the skilled organizations which supervised and approved the stowage. If there was negligence in failing to make an adequate study of the characteristics of Fgan on the part of the Coast Guard, the Board of Underwriters, the Fire Department or Terminal Shipping Co., this would not impose any liability on either of the respondents. *The Annie Faxon, supra,* p. 12; *Petition of Canadian Pacific R'way Co.*, 278 Fed. 180, at p. 189, and cases cited; *The Columbia*, 25 F. (2d) 516, affirmed 25 F. (2d) 518, C. C. A. 2.

11. The petition, at pages 12 and 13, quotes extracts from the dissenting opinion and from the opinion of the District Judge.

In the dissenting opinion, it is said that there was an onerous duty to use due care as to the nature and qualities of Fgan.

Conceding, for the sake of argument, that such a duty existed, it was fully performed as shown by the extraordinary precautions taken when the Fgan was loaded and stowed (*supra,* p. 5).

With reference to the extracts from the opinion in the District Court, quoted in the petition, it should be pointed out that the District Judge disabled himself from reaching a correct conclusion by his insistence on deciding the case

without waiting for the testimony to be typed (Typewritten Record, p. 1006, not printed in either Appendix). As the Trial Judge did not have before him the text of the expert testimony, erroneous conclusions were almost unavoidable; for the same reason counsel were unable to refer to this expert testimony with any exactitude in the briefs submitted at the close of the trial.

12. The petition further states, page 16, that "Cosmopolitan gave no directions to Terminal to consult with a chemist and ascertain what dangers should be guarded against". This is a trivial point because Terminal Shipping Co. did consult a chemist (*supra*, p. 11).

The Assistant Operating Manager of Cosmopolitan did write to Terminal on June 11th, notifying Terminal to "consult the U. S. Coast Guard, who must be notified and under whose direction this commodity is loaded."

By the U. S. Statute, the Coast Guard was given jurisdiction over the loading of Fgan (*supra*, p. 12), and that jurisdiction was exercised in this case. The Coast Guard had conducted a lengthy investigation as to the fire at Texas City (A. 258), and the Chairman of the Interagency Committee was the head of the Coast Guard's Hazard Prevention Section, Merchant Vessel Inspection Division (A. 692, 693). The presumption applies that the Coast Guard adequately performed it duty of investigating the cause of the fire on the Grandcamp, and such characteristics of Fgan as might render it hazardous. *U. S.* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 15; *U. S.* v. *Rock Royal Cooperative*, 307 U. S. 533, 567, 568. In addition to the Coast Guard, the Board of Underwriters was also consulted as a matter of course.

13. The petition cites, at page 16, some cases which did not involve fire damage to cargo, as did the case at bar, and also *Great Atlantic & Pacific Tea Co.* v. *Lloyd Brasileiro*, 159 F. (2d) 661, C. C. A. 2. In that case, the s/s Pocone came into New York, having had a fire in her coal

bunkers while at sea. An officer of the shipowner was notified that the coal bunkers had been on fire but failed to make an adequate investigation. This was held to be the neglect of the shipowner. Obviously, the case is entirely different from that now under consideration.

At page 17, the petition cites *Cornec* v. *B. & O. RR. Co.* (*The Richelieu*), 48 F. (2d) 497, C. C. A. 4, in which case an explosion had occurred during the loading of pitch on a French vessel. The explosion was due to a cloud of pitch dust being set on fire by the emission of sparks and flashes from the worn electrical machinery of the railroad. This was held to be negligence on the railroad's part because of the "general and common knowledge existent as to the explosive character of carbonaceous dusts in general." In fact, just before the explosion, pitch dust had been ignited by electricity on two separate occasions, 48 F. (2d) at page 502.

14. The petition, at page 20, states the following as its second point:

> "II. Does the fire exception of the Carriage of Goods by Sea Act provide a carrier with an exemption from liability for damage to cargo discharged on shore after an unjustifiable deviation?"

The above point is not difficult to answer.

(a) There was no deviation. The District Court so held (*supra*, p. 2), and this conclusion was affirmed by the Court of Appeals (R. pp. 35, 36; see too the opinion of the District Court at A. 56 through A. 63). The petition does not challenge the correctness of these conclusions, but makes merely the bald statement that there was a deviation.

(b) Petitioners admit that there is nothing in their deviation point in so far as the cargo on board the Ocean Liberty is concerned, but endeavor to draw a distinction with respect to the comparatively small amount of cargo, slightly injured by fire while on the dock.

The distinction sought to be drawn is that, while, by statute, all liability was eliminated so long as the cargo was on board the ship, this statutory protection ceased the moment the cargo was placed on the wharf, even though it was hoped that the cargo would be reloaded as soon as the discharge of the French Government cargo (not included in this litigation) had been completed.

This is not a correct construction of the statutes involved. The Fire Statute, R. S. 4282, 46 U. S. C. 182, covers loss or damage to merchandise "which shall be shipped, taken in or put on board any such vessel by reason or by means of any fire happening to or on board the vessel * * *." In the present instance, the "merchandise," damage to which is claimed, was put on board the vessel, and the fire happened to or on board the vessel. The fire did not originate on shore; the fire on the vessel proximately caused the fire damage to the merchandise.

The Carriage of Goods by Sea Act (quoted, R. 30) should be construed in the same way. By that Act, the term "carriage of Goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship, 46 U. S. C. 1301(e). The term "discharged" when so used does not mean a mere temporary putting of the goods ashore, with the expectation that the voyage may be resumed. The "discharge" referred to in the statute obviously means a discharge at the port of delivery where the carrier's liability is terminated.

(c) However, even were the above conclusions incorrect, it would be immaterial because the contract of carriage provides:

> (1) that the "provisions of the Carriage of Goods by Sea Act are to govern after the goods are discharged from the ship * * *" (A. 20);
>
> (2) that the carrier is not to be liable to answer for or make good any loss or damage to the goods, even after discharge of the ship by reason or by means of

any fire whatsoever, unless such fire shall be caused by its design or neglect (A. 23).

Furthermore, by the terms of the contract of carriage, the above provisions are binding

> "in every contingency, wheresoever and whensoever occurring, and *also in the event of deviation* * * *" (A. 19). (Italics ours.)

Consequently, even if there were a deviation, which is denied, there can be no liability on the part of the carrier.

15. The petition, at pages 23-27, proposes "additional questions to be urged if the petition is granted." As these questions are not of sufficient importance to justify the granting of a petition for certiorari, it is inappropriate for respondents to discuss them at the present time.

16. The petition, at pages 27-28, lists six alleged reasons for the granting of the writ. While the general statement is made that the decision is in conflict with the rules in other circuits, this is not in fact the case and no authorities are adduced in support of petitioners' contention.

The case at bar was decided on the basis of its particular facts, which showed that there was no negligence on the part of anyone concerned, and it is not of actual interest to any litigants other than the parties thereto.

LAST POINT

The petition for a writ of certiorari should be denied.

Dated, January 5, 1953.

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